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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement The Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”).

Rulemaking: R. 06-10-005

OPENING COMMENTS BY

CITY OF PASADENA

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Dated: October 25, 2006

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**OPENING COMMENTS
BY CITY OF PASADENA**

INTRODUCTION

The City of Pasadena (“Pasadena”) thanks the California Public Utilities Commission (“Commission”) for providing the opportunity to comment on the Commission’s proposal for implementing the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”). In accordance with Ordering Paragraph 5 of the Commission’s Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement [DIVCA] issued on October 5, 2006, Pasadena timely files opening comments.

Pasadena has granted and managed video service franchises for more than 20 years. Pasadena has long promoted competition in the area of video services, having granted a competitive open video system (OVS) franchise to a small overbuilder in 2001. Given this experience, Pasadena is especially well qualified to comment on the Commission’s Order. Further, DIVCA clearly grants local governments the authority to regulate video service providers via public right-of-way encroachment permitting, Electrical and Building Safety Codes, and customer service standard enforcement.

Pasadena makes four recommendations regarding Commission adoption of specific administrative practices to protect the interests of local governments and the residents that they serve. Further, Pasadena advises that the Commission’s application process be modified to notify applicants of these local regulatory processes and to require applicants to acknowledge their responsibilities to cooperate with local authorities in these matters.

I. A LOCAL GOVERNMENT AND THE PUBLIC SHOULD BE ALLOWED TO FILE COMMENTS REGARDING THE GRANTING OF ANY STATE VIDEO FRANCHISE THAT WILL AFFECT THEM, AS WELL AS ANY FRANCHISE MODIFICATIONS SUCH AS TRANSFERS AND RENEWALS.

The Commission's Draft General Order states at page 14 that "No person or entity may file a protest to an application." This statement is repeated in the Order Instituting Rulemaking at page 11. Pasadena strongly advises that the statewide video franchising process should allow local governments, other entities, and members of the public to comment on and, when appropriate, protest video franchise applications. Local governments have many years of experience in evaluating franchise applicants' financial, legal, and technical qualifications. In many cases, local governments also have years of direct operational experience with the companies that will be applying for statewide franchises. The Commission would fail the public were it to bar expert comments from local governments.

Additionally, members of the public need to have a voice in the state franchising process. Pasadena strongly urges the Commission to allow and encourage comment by members of the public.

DIVCA does not prohibit filing of comments regarding state franchise applications. In fact, the Commission is required to collect "adequate assurance that an applicant possesses the financial, legal, and technical qualifications necessary to construct and operate the proposed system and promptly repair any damage to the public right-of-way caused by the Applicant (Cal. Pub. Util. Code 5840(e)(9)). DIVCA also expressly gives local governments the opportunity to review applications from companies that intend to provide service in their jurisdictions (Cal. Pub. Util. Code 5840(e)(1)(D)).

The franchise transfer and renewal processes also would benefit greatly by Commission acceptance and meaningful consideration of comment by local governments and members of the public affected by these actions. However, the Draft General Order does not describe any comment process for franchise transfers or renewals.

Finally, Pasadena submits that the Commission eliminate any restriction on local government participation in the processes of this Commission because they implicate very serious First Amendment and due process concerns under the state and/or federal constitutions. Instead, the Commission should implement rules and policies designed to encourage local government participation and partnership.

II. BOND REQUIREMENTS SHOULD BE HIGHER THAN THE PROPOSED AMOUNT OF \$100,000 AND THE BONDS SHOULD BE DESIGNED TO TRULY PROTECT LOCAL GOVERNMENTS AND THEIR CONSTITUENTS.

The Public Utilities Code, subsection 5840(e), states that the Commission may require a bond to ensure that state franchise applicants possess the qualifications to construction and operate their proposed video systems, "...and promptly repair any damage to the public right-of-way caused by the applicant." Unquestionably, the entities most likely to need the protection of these bonds are local governments and their constituents, rather than the Commission.

The Draft General Order proposes that applicants post a bond valued at \$100,000 or produce a financial statement that demonstrates that the applicant possesses a minimum of \$100,000 unencumbered cash that is reasonably liquid and readily available to meet expenses (Section IV.A.1(a)). Local governments often use security instruments to address cable TV and OVS operator deficiencies in meeting franchise agreements. In Pasadena, the City has had to draw on such a security to recover unpaid franchise fees, PEG payments, undergrounding costs, and pole attachment fees. In Pasadena's experience, the \$100,000 bond is not sufficient for a city the size of Pasadena, and certainly would not adequately protect local governments and the public across much larger franchise areas. For entities that will be constructing plant to serve video customers, Pasadena strongly urges the Commission to require a bond of at least \$500,000, or \$100,000 for every 20,000 customers served, whichever of these two options is greater. For video systems that have already been constructed, the bond amounts should, at a minimum, be consistent with security requirements to which cable operators have already agreed.

Further, the Commission should eliminate the option of simply providing proof of cash on hand. In Pasadena's experience, video service providers may have financial resources when an application is filed, but those resources may no longer be available when problems occur. In addition, the video service provider would be under no obligation to make the unencumbered cash available to remedy damage to the right-of-way.

Finally, Pasadena recommends that all local governments in whose areas a video service provider is operating should be identified as obligees on the bond.

III. DIVCA EXPRESSLY STATES THE LEGISLATURE’S INTENT THAT LOCAL GOVERNMENT REVENUES BE PROTECTED. THE COMMISSION SHOULD PROMOTE THIS LEGISLATIVE PRINCIPLE.

Subsection 5810(a)(2)(C) of the Public Utilities Code states: “Legislation to develop this new process should adhere to the following principles: (C) Protect local government revenues and control of public rights-of-way.” The Public Utilities Code goes on to state at Subsection 5810(d): “It is the intent of the Legislature that the definition of gross revenues in this division shall result in local entities maintaining their existing level of revenue from franchise fees.”

Pasadena urges the Commission to take steps to help carry out this mandate and protect local government revenues. These steps should include:

A. Identifying Commission-assessed DIVCA fees as “general applicability fees”: The Commission has been creating and implementing fee schedules for decades, and has developed considerable expertise in creating and implementing “fees of general applicability. The Commission should use this extensive experience to create general applicability fee frameworks with respect to Commission-assessed DIVCA fees.

B. Administering DIVCA fees to prevent justifications for offsetting fees against franchise fees owed local governments: The Commission should calculate and administer all DIVCA fees in a manner that does not create or appear to create legal justifications for offsetting these fees, wholly or in part, against franchise fees owed local governments.

C. Clarifying the nature of these fees on the Commission’s Application Form: Pasadena recommends that the draft Commission-created “Application Form” attached to the Draft General Order be modified to contain a statement whereby the applicant expressly agrees that any Commission- or State-assessed fees do not constitute franchise fees and cannot be offset by the applicant against any fees or obligations of any nature owed or owing the local government in which the franchisee operates pursuant to the state franchise.

D. Setting application and other processing fees at realistic levels: Pasadena advises that the Commission’s proposed application fee of \$2,000 is significantly underestimated. This amount is much lower than Pasadena’s standard \$15,000 application fee, which is

designed to cover basic staff time reviewing franchise applications. Based on the City's experience, Pasadena recommends a higher fee that would more accurately reflect the Commission's actual review costs. Further, a higher application fee would allow the Commission to reduce the corresponding user fee.

At present, the Draft Order does not require fees for other Commission actions, like transfers and renewals, related to state franchises. Pasadena recommends that the Commission should assess processing fees for reviewing and responding to requests from franchisees, such as requests for assignment or transfer of franchises, modifications such as those to change service territories covered under the franchise, and franchise renewals. State franchisees that request franchise modifications and create additional work for the Commission should be required to provide the appropriate remuneration to the Commission. Consistent with the Draft Order's definition for "Application Fee," the amount of these additional fees should be based on the Commission's actual and reasonable costs of processing an application. Pasadena submits that these fees should appropriately match the cost of processing franchise changes with the entities causing the changes, and that these fees would not place an undue burden on state franchisees.

IV. THE COMMISSION SHOULD TAKE STEPS TO ENSURE THAT THE COMMISSION AND LOCAL GOVERNMENTS RECEIVE ALL REQUIRED INFORMATION IN A TIMELY MANNER.

In order for the Commission and local governments to complete DIVCA-related tasks successfully, both the Commission and local agencies must be able to access the necessary comprehensive information in a timely manner. Based on Pasadena's decades of experience administering cable television franchises, Pasadena recommends that the Commission take the additional following information-gathering steps:

A. With respect to the Local Entity contact information template required by Item 20 on page 9 of the "Franchise Application," the Commission should update this template annually each year an applicable franchise is in effect, initiating this process by using the most recent template each January to contact the appropriate Local Entities;

B. When approving or denying a franchise application, or requesting more information from an applicant, the Commission should provide written copies of the pertinent documentation to affected or potentially affected local governments

concurrently with the provision of this documentation to the applicant;

C. Work with local governments to timely create standard information solicitation forms regarding several areas—including, but not limited to:

- i. Local entity contact information to be used by applicants and the Commission, including primary contacts pertaining to franchise fee payments and PEG Access operational issues;
- ii. Gross revenues/franchise fee documentation to be submitted with quarterly franchise fee payments to Local Entities; and
- iii. PEG Access information, including channel activation, channel location, PEG Access funding/fees, and other support.

V. THE DRAFT “APPENDIX A” (“FRANCHISE APPLICATION” AND “AFFIDAVIT”) SHOULD BE MODIFIED TO BETTER PROTECT LOCAL GOVERNMENTS AND THEIR CONSTITUENTS.

Pasadena recommends that the Commission amend the “Franchise Application” and “Affidavit” as follows:

A. Eliminate the \$100,000 bond amount in Item Number 19 on page 9 and use this Item to inform the applicant that the Commission will: (a) determine the proper amount and format of the bond after reviewing the application; (b) inform the applicant of the Commission’s determinations; and (c) require that the applicant submit a properly executed bond to the Commission, as well as copies to all affected local governments, no later than sixty (60) days before beginning video system construction;

B. Revise Item 2 in the second set of conditions in the Affidavit, so that this Item reads: “Applicant will abide by all consumer protection laws and rules addressed expressly or by reference in Section 5900 of the Public Utilities Code, as well as all other applicable consumer protection laws and rules, and acknowledges that one or more Local Entities will serve as the primary enforcement entity with respect to these standards.”

C. Revise Item 3 in the second set of conditions in the Affidavit, so that Item 3 reads: “Applicant will timely and fully remit all fees required by subdivision (a) of Section 5860 of the Public Utilities Code to the appropriate Local Entity and agrees that no fees assessed by the Commission may be offset against these Section 5860 fees, in whole or in part.”

D. Revise Item 4 in the second set of conditions in the Affidavit, so that Item 4 reads:

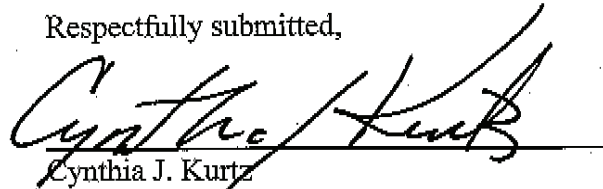
"Applicant will timely and fully provide the public, educational, and governmental access (PEG Access) channels, as well as associated funding and support (such as system interconnection, where applicable), required by AB 2987, as well as any continued institutional network (I-Net) facilities and support required by AB 2987."

Pasadena submits that these modifications will result in better understanding by the state franchise applicants of their obligations and better protection of local government and public rights under DIVCA.

V. CONCLUSION

The broad scope of DIVCA and the short period of time given to begin implementing its new regulatory framework have created many challenges for local governments. Pasadena has based the recommendations contained in these opening comments on its considerable and lengthy experience administering video franchises. Pasadena hopes that you will find these comments of use. Pasadena also looks forward to working with the Commission to bring about an implementation of DIVCA that is in the best public interest. Should you have any questions regarding the issues raised in these comments, please contact me at your earliest opportunity.

Respectfully submitted,



Cynthia J. Kurtz

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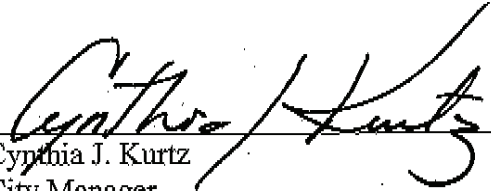
Dated: October 25, 2006

VERIFICATION

I am an officer of the City of Pasadena, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2006, at Pasadena, California.



Cynthia J. Kurtz
City Manager

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider the Adoption of a General Order and
Procedures to Implement The Digital Infrastructure and Video Competition Act of
2006 ("DIVCA").

Rulemaking: R. 06-10-005

**NOTICE OF AVAILABILITY OF THE COMMENTS OF TELECOM SERVICES
IN RESPONSE TO THE OIR ON DIVCA**

October 25, 2006
City of Pasadena
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Cynthia J. Kurtz
City Manager

Pursuant to Rule 2.3 (c), (d) and (e) of the Commission's Rules of Practice and
Procedure, The City of Pasadena hereby submits this Notice of Availability of the
Comments of Telecom Services which were filed on this Commission on October
25, 2006. Any recipient of this Notice of Availability who is not receiving service
by electronic mail in this proceeding may request a paper copy of the document.
Please direct all such requests to Shinji Hosokawa at 626-744-7252, fax: 626-396-
7697 or e-mail: shosokawa@cityofpasadena.net.

Dated: October 25, 2006

Respectfully submitted,

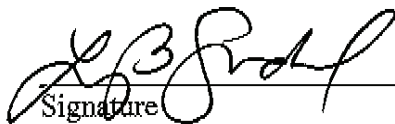
City of Pasadena

By 
Cynthia J. Kurtz
City Manager

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of Initial Comments to Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement The Digital Infrastructure and Video Competition Act of 2006 ("DIVCA") by the City of Pasadena on all known parties to R.06-10-005 mailing a properly addressed copy by first-class mail with postage prepaid, or transmitting an e-mail message with the document attached, to each party named in the official service list.

Executed on October 25, 2006 at Pasadena, California.


Signature

Public Utilities Commission – Service List

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